No. 84-58

IN THE
Supreme Court of the United States
October Term, 1984

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

BENNY K. CHAFFIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS, AT TEXARKANA, TEXAS

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QUESTIONS PRESENTED

Texas state courts, in administering jury trials in personal injury actions brought under the Federal Employers' Liability Act, have approved the "case-by-case" approach to adjusting damage awards to account for future inflation. The controlling federal circuit law, however, decrees that the "case-by-case" method "should not be used in this circuit." Rather, in jury trials, "fact-finders in this Circuit must adjust damage awards to account for inflation according to the below-market discount rate method." *Culver* v. *Slater Boat Co.*, 722 F.2d 114, 120, 122 (*en banc* 5th Cir. 1983). The Questions Presented are:

1. Should the "below-market-discount" rate method for determining lost future earnings in an inflationary economy be established as the exclusive method for use in FELA jury trials?

2. Does the principle of uniformity in the administration of FELA jury trials require that state trial and appellate courts follow the controlling federal circuit law with respect to adjusting damage awards to account for future inflation?

3. Does the principle of uniformity prevent state courts from independently adopting the "case-by-case" approach to the inflation factor in jury trials (a) when the controlling circuit law on the matter is to the contrary, and (b) when that contrary federal rule is first announced during the pendency of an appeal to the state appellate courts of the state court jury verdict?

Rule 28.1 Listing

1. Kansas City Southern Industries, Inc. [parent].
2. The Kansas City Northern Railway Company.
3. The Kansas City Southern Railway Company. [petitioner].
4. Louisiana & Arkansas Railway Company.
5. The American-Coleman Company.
6. American-Coleman International Corp.
7. The Arkansas Western Railway Company.
8. Boston Financial Data Services, Inc.
9. Carland, Inc.
10. Cybertech, Inc.
11. DST, Inc.
12. DST Clearing, Inc.
13. DST-Computer-Services, S.A.
14. DST Securities, Inc.
15. Fort Smith and Van Buren Railway Company.
16. Investors Fiduciary Trust Company.
17. Joplin Union Depot Company.
18. The Kansas and Missouri Railway and Terminal Company.
19. Kansas City Southern Transport Company, Inc.
20. Kansas City Terminal Railway Company.
21. Landa Motor Lines.
22. Lonestar-KC Concrete Tie Company.
23. Louisiana, Arkansas & Texas Transportation Company.
24. The Maywood and Sugar Creek Railway Company.
25. Midwestern Minerals, Inc.
26. Mid-America Television Company.
27. Northern Properties Corporation.
28. Pabtex, Inc.
29. Pioneer Western Corporation.
30. Pioneer Western Energy Corporation.
31. Pioneer Western Financial Corporation.
32. Pioneer Western Financial Planning Corporation.

33. Pioneer Western Management, Inc.
34. Pioneer Western Marketing Corporation.
35. Reserve Realty.
36. Rice-Carden Corporation.
37. Rycom Instruments, Inc.
38. Southern Development Company.
39. Supporet Systems, Inc.
40. Tolmak, Inc.
41. Trans-Serve, Inc.
42. Veals, Inc.
43. Wall Street Clearing Company.
44. Western Reserve Financial Services Corp.
45. Western Reserve Life Assurance Co. of Ohio.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS, AT TEXARKANA, TEXAS

Petitioner, The Kansas City Southern Railway Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Sixth Supreme Judicial District of the State of Texas at Texarkana, Texas, entered July 19, 1983.

OPINION BELOW

The opinion of the Texas Court of Appeals, entered on July 19, 1983, is reported at 658 S.W.2d 186 and is reproduced in the appendix of this petition, p. 1a, *infra*. Its unreported order denying rehearing is reproduced at p. 11a, *infra*.

The unreported order of the Supreme Court of Texas refusing review, with the notation of "No Reversible Error," is reproduced in the appendix, p. 12a, *infra*. The unreported order of that court overruling a motion for rehearing is reproduced at p. 13a, *infra*.

The District Court of Morris County, Texas, wrote no opinion. Its unreported final judgment, entered on November 25, 1981, is reproduced in the appendix, p. 15a, *infra*.

JURISDICTION

The judgment of the Texas Court of Appeals was entered on July 19, 1983, p. 9a, *infra*. Its order overruling a motion for rehearing was entered on August 16,1983, p. 11a, *infra*.

The order of the Supreme Court of Texas refusing an application for writ of error, with the notation "No Reversible Error," was entered on February 15, 1984, p. 12a, *infra*. The Supreme Court's order overruling a motion for rehearing was entered on March 14, 1984, p. 13a, *infra*.

On timely application, Justice White on June 2, 1984, ordered that the time for filing this petition for certiorari be extended to and including July 12, 1984. On April 10, 1984, the Texas Court of Appeals stayed its mandate pending disposition of this petition for certiorari, p. 14a, *infra*.

The jurisdiction of this Court to review the final judgment of the Texas Court of Appeals is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Art. I, Sec. 8, Cl. 3:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .

United States Constitution, Art. VI, Cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Federal Employers' Liability Act, 45 U.S.C. §51:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the State or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appli-

ances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Federal Employers' Liability Act, 45 U.S.C. §56:

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

STATEMENT OF THE CASE

A. Trial proceedings

Benny K. Chaffin, the respondent herein, was employed by the petitioner Kansas City Southern Railway Company as an engineer trainee. On August 2, 1979, Chaffin was injured in a switching collision near Hughes Spring, Texas. He sustained a compressed fracture of the T-7 vertebra.

(S.F. 43).[1] Then 28 years of age, Chaffin obtained medical treatment for his injury. And beginning in August 1981, he took a part-time job as a school bus driver. (S.F. 68). But he never returned to work for the petitioner railroad.

Chaffin brought this action for damages, pursuant to the Federal Employers' Liability Act (FELA), in the District Court of Morris County, Texas.[2] He alleged that the injuries suffered in the switching collision were due to the railroad's negligence. The petitioner railroad stipulated that it was fully liable for Chaffin's injuries, leaving only the amount of damages to be determined by the jury. The trial as to damages took place in November of 1981.

Chaffin sought damages for medical expenses, past lost wages, past and future pain and suffering, and total loss of future wage earning capacity. Only the latter item is now before this Court. And the matter is further refined in terms of the proper method of measuring future anticipated inflation in a FELA action for damages for lost earning capacity.

At the time of this trial in 1981, it was settled federal law – *i.e.*, settled by the Fifth Circuit for all state and federal courts within its geographic bounds – that in FELA-type cases "the influence on future damages of possible inflation or deflation is too speculative a matter for judicial determination" and the jury "should not be instructed to take into account future inflationary or deflationary trends in computing future lost earnings." *Johnson* v.

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[1]"S.F." refers to the trial transcript, known as a Statement of Facts. "Tr." refers to the transcript of pleadings, motions, verdict and judgment.

[2]Chaffin initially filed his FELA suit in the federal district court for the Eastern District of Texas. That suit was dismissed and refiled in the state court.

Penrod Drilling Co., 510 F.2d 234, 241 (*en banc* 5th Cir. 1975), *cert. denied*, 423 U.S. 839 (1975).[3] Despite that clear federal mandate, the Texas trial court permitted Chaffin to introduce expert testimony as to the impact of future inflationary trends on Chaffin's lost earning capacity. The petitioner railroad, relying upon the *Penrod* directive, vigorously objected both before trial (Tr. 70) and during trial (S.F. 64, 284) to the introduction of such testimony. All objections were overruled. But to preserve such objections, the railroad submitted no economic data or expert witnesses in rebuttal; it could only cross-examine.

Chaffin's expert witness was an economist, Dr. Dale Funderburk. He sought to project future anticipated inflation as an element of damages for Chaffin's lost earning capacity. A summary of his testimony is contained in Chaffin's Exhibit 6, copies of which were submitted to the jury. The full text of the exhibit is as follows:

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[3]The *Penrod* rule is discussed by this Court in *Jones & Laughlin Steel Corp.* v. *Pfeifer*, ____, U.S. ____, 103 S.Ct. 2541, 2552, 2554 (June 15, 1983). Prior to the instant trial, the *Penrod* rule had been reaffirmed several times by the Fifth Circuit: *Davis* v. *Hill Engineering, Inc.*, 549 F.2d 314, 332 (5th Cir. 1977); *Matter of S/S Helena*, 529 F.2d 744, 753 (5th Cir. 1976); *Lacase* v. *Olendorff*, 526 F.2d 1213, 1222 (5th Cir. 1976) (trial court erred in overruling objection to such testimony); *Byrd* v. *Reederei*, 638 F.2d 1300, 1307 (5th Cir. 1981); *Culver* v. *Slater Boat Co.*, 644 F.2d 460, 463 (5th Cir. 1981).

WAGE LOSS

PAST WAGES – through November 2, 1981

Net Wages - Past		$54,123.00
Plus Fringes		5,412.00
	TOTAL	$59,535.00
Less Salary		650.00
	TOTAL	$58,885.00

FUTURE – 31.45 years

Gross Wages		$1,605,603.00
Less taxes		88,308.00
NET		1,517,295.00
		128,448.00
	TOTAL	$1,645,743.00

TOTAL WAGES

Less driver's salary $2,500/year or 7% of salary	$ 115,202.00

TOTAL FUTURE LOSS	$1,530,541.00

Dr. Funderburk in his testimony presented a lost wage earning capacity estimate that assumed a regular 9% annual inflationary increase over the next 31.45 years (Chaffin's assumed work time potential), discounted at 6.5% per year, which totals $1,605,603. (S.F. 285-300). As indicated in Exhibit 6, Dr. Funderburk testified that he had reduced this "gross wages" figure by 20% per installment for estimated taxes that would have been payable if personal injury damages were taxable income, added $128,448 as estimated lost future fringe benefits, and arrived at a total of $1,645,743. He then subtracted $115,202, a figure derived by projecting 9% annual inflation and 6.5% annual discounting with respect to Chaffin's school bus driver pay ($2,500 per annum) over

31.45 years into the future. (S.F. 302-06). This produced a net "future loss" of earnings of $1,530,541. (S.F. 306). He used the same 9% annual inflation and 6.5% annual discounting rates in calculating Chaffin's lost earning capacity with the railroad. (S.F. 286-90).

Dr. Funderburk used 1981 as the base year for the railroad wage of $35,701, obtained from projecting over 12 months a similar worker's earnings for seven months and adding 4.5% to the total for half a year's estimated inflation. (S.F. 295, 302, 315, Ex. 4). Similarly, he used that base year in dealing with the school bus driver wage of $2,500, projected from about three months worked by Chaffin prior to trial. (S.F. 305). Dr. Funderburk forecast the 9% annual inflationary wage increase rate from the Consumer Price Index and the annual average wage increase data for railroad workers over the period 1967 through 1980. (S.F. 286, 302, 376). He obtained the 6.5% annual discount rate by averaging historical interest rates for safe United States Treasury securities and bank savings accounts over the same period. (S.F. 289, 292, 293-94, 322-23).

No evidence was presented that Chaffin, had he not been injured, would have received any future pay increase with the railroad, due to merit, promotion, productivity, or any individual or societal factors except inflation. There was no evidence of any wage increase expectancy by virtue of an employment contract or collective bargaining agreement. On cross-examination, Dr. Funderburk conceded (and Chaffin's counsel so stipulated) that, as of the time of trial at current interest rates for 19 risk-free United States Treasury Bonds with staggered maturities from 1982 to 2011, Chaffin would earn 13.87% annually on his investment if he purchased these securities in the market and held them to maturity. (S.F. 341, 343-45, Def. Ex. 3).

Apart from his request of $1,530,541 (as calculated on the above Exhibit 6) to compensate for lost future earning capacity, Chaffin asked the jury to award damages totalling $573,328 for lost past wages, lost household services, and past and future pain and suffering. (S.F. 301, 689, Pl. Exs. 6 and 7). Chaffin's 1979 federal income tax W-2 form reflected that at the time of injury he was earning $2,239.69 per month gross pay, less $368.90 per month withheld, for a net wage of $1,870.79 per month or $22,449.48 per year, projecting from seven months worked. (S.F. 62, Pl. Exs. 1-3). Using the 31.45 year work-life expectancy, as did Dr. Funderburk, one can quickly calculate that the future take-home pay, at Chaffin's wage rate at the time of injury, would accumulate to $706,036.14. Subtracting $2,500 per year in school bus pay over the same period produces an undiscounted balance of $627,411.14.

Utilizing these figures, the largest award a jury could have returned undiscounted, excluding the annual addition for anticipated inflation, would have been $1,200,739.10 – or $568,120.90 below the jury's verdict of $1,768,860. Thus the jury's verdict, ostensibly after discounting the lost future earning capacity portion, contains an inflation bonus equal to at least 90% of a lost earnings projection based on wages at time of injury ($568,120.09 divided by $627,411.14), prior to any discounting of the installments comprising the projection to reduce the sum to a present value and after compensating Chaffin separately for lost income between the date of injury and time of trial.[4]

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[4]Petitioner assumes that the jury intended to award the full amount of past lost wages, $58,885, calculated by Dr. Funderburk for the period from the injury (Aug. 2, 1979) to trial. Chaffin's counsel requested "$58,000" in jury argument. (S.F. 689, 692).

(footnote cont'd)

As indicated, the jury returned a lump sum verdict of $1,768,860 in damages. Neither the jury nor the trial judge made any special finding as to the inflation factor incorporated in that verdict. This verdict was rendered after the jury was given instructions of a most general nature, no reference being made to the inflation factor or to evaluating Dr. Funderburk's testimony in that regard. Pertinent excerpts from the instructions appear in the appendix hereto, p. 17a, *infra*. The most relevant portion (p. 18a, *infra*) instructs the jury, in arriving at any amount relative to the impairment or decrease in Chaffin's capacity or ability to earn money in the future, to "allow only the present value thereof, and make your calculations of the same on the basis of the amount found by you bearing interest at the highest rate of interest prevailing at the time and place of trial that can be had on money safely invested and secured."

B. Appellate proceedings

The railroad pursued its objection to the introduction of Dr. Funderburk's testimony regarding inflation on its appeal to the Texas Court of Appeals. Relying primarily on the Fifth Circuit's ruling in *Johnson* v. *Penrod Drilling Co., supra,* the railroad argued that "under the law of this federal circuit as it currently stands, the lower court clearly erred in this F.E.L.A. case by admitting, over proper objection, evidence of the effects of inflation and of com-

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(footnote 4 cont'd)

Petitioner likewise assumes, *arguendo*, that the jury intended to award the full sums requested by Chaffin for past pain and suffering, $220,000 (S.F. 689), future pain and suffering, $220,000, and diminished ability to perform household services, $74,443. (*Id.*). Added to $58,885 for pretrial lost wages, these total $573,328 in requested damages for all items other than lost future wage earning capacity.

parative wages for consideration by the jury." Brief of Appellant, p. 16. That brief (pp. 14-15) also relied upon two recent Fifth Circuit reaffirmations of the *Penrod* precedent: *Culver* v. *Slater Boat Co.*, 644 F.2d 460 (5th Cir. 1981); *Byrd* v. *Reederei*, 638 F.2d 1300 (5th Cir. 1981). This argument accurately portrayed the state of the federal law within the Fifth Circuit on the inflationary factor, the law as it stood at the time of the trial in November 1981.

But on September 22, 1982, after this case had been briefed and argued in the Texas Court of Appeals, the Fifth Circuit overruled its *Penrod* rule barring introduction of evidence concerning inflation. It did so in an *en banc* reconsideration of its *Culver* and *Byrd* panel decisions, consolidating the two appeals sub nom. *Culver* v. *Slater Boat Co.*, 688 F.2d 280 (*en banc* 5th Cir. 1982) (known as *Culver I*). The *Culver I* decision was promptly brought to the attention of the Texas Court of Appeals. Some 10 months later, the Texas Court of Appeals ruled as follows (658 S.W.2d at 188, p. 2a, *infra*):

> This cited case [*Johnson* v. *Penrod Drilling Co.*] clearly bans the admission of evidence of inflationary conditions in Jones Act and F.E.L.A. based damage suits. However, the recent case of *Culver* v. *Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982), expressly overrules this part of the Penrod case. The court in *Culver* held:
>
> ". . . that Penrod's prohibition of any consideration of inflationary factors is unfair to plaintiffs and is therefore overruled . . . plaintiffs should be permitted to establish by factual economic and labor data, and expert testimony, that their income would probably continue to increase in response to inflation in future years if they continued to work. Likewise, using economic and labor data and ex-

> pert testimony, the defendant should be permitted to rebut such evidence." *Culver,* supra, 688 F.2d at 305.
>
> In view of this recent case, it is evident that the admission of inflation evidence [in this case] was not error.

But in purporting to follow *Culver I,* the Texas Court of Appeals did not extend to the petitioner railroad what the Fifth Circuit said should be accorded all defendants in such cases, *i.e.,* "using economic and labor data and expert testimony, the defendant should be permitted to rebut such evidence." Nor was the jury instructed as to the *Culver I* principles. Moreover, *Culver I* said that it was intended to control cases not only being tried now or hereafter but "those heretofore tried and now on, or subject to, appeal in which the issues [admissibility and application of evidence as to inflation] has been properly and adequately raised." 688 F.2d at 311.

Moreover, about five weeks prior to the Texas Court of Appeals ruling, this Court decided *Jones & Laughlin Steel Corp.* v. *Pfeifer,* ____ U.S. ____, 103 S.Ct. 2541 (June 15, 1983). The Texas opinion makes no mention or use of the *Pfeifer* ruling, although the parties promptly notified the Texas court of the *Pfeifer* decision.

By following *Culver I,* the Texas Court of Appeals approved the "case-by-case" method of adjusting damage awards to account for the effect of future inflation.[5]

[5]As later defined in *Culver II,* "In the case-by-case method, the fact-finder is asked to predict all of the wage increases a plaintiff would have received during each year that he could have been expected to work, but for his injury, including those attributable to price inflation. This prediction allows that fact-finder to compute the income stream the plaintiff has lost because of his disability. The fact-finder then discounts that income stream to present value, using the estimated after-tax market interest rate, and the resulting figure is awarded to the plaintiff." 722 F.2d at 118.

Culver I had indeed endorsed that method as "simpler and more accurate" than other possible approaches. 688 F.2d at 298. But even under the *Culver I* approach, the petitioner would have been entitled to a new trial in order to present its own economic evidence as to inflation, an opportunity denied it by the Texas Court of Appeals.

Later, on December 22, 1983, came the Fifth Circuit's repudiation of its own *Culver I* methodology as an option available in jury trials. In an *en banc* reconsideration of *Culver I* in light of this Court's *Pfeifer* decision (a non-jury case), the Fifth Circuit held that the "case-by-case" method "should not be used [in jury trials] in this circuit to adjust damage awards for inflation," and that jury "fact-finders in this Circuit must adjust damage awards to account for inflation according to the below-market discount rate method."[6] *Culver* v. *Slater Boat Co.*, 722 F.2d 114, 120, 122 (*en banc* 5th Cir. 1983) (known as *Culver II*). And the Fifth Circuit, in selecting a single method of accounting for inflation in jury trial awards, made use of the "below-market discount" method mandatory in all courts within the circuit except as to "any case in which, before the date this opinion was published, either a jury returned a verdict after being instructed on the basis of the principles set forth in *Culver I*, or a judge made findings of fact fixing damages pursuant to those principles." 722 F.2d at 123.

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[6] *Culver II* described the below-market-discount method as follows: "the fact-finder does not attempt to predict the wage increases the particular plaintiff would have received as a result of price inflation. Instead, the trier of fact estimates the wage increases the plaintiff would have received each year as a result of all factors other than inflation. The resulting income stream is discounted by a below-market discount rate. This discount rate represents the estimated market interest rate, adjusted for the effect of any income tax, and then offset by the estimated rate of general future price inflation." 722 F.2d at 118.

The petitioner railroad applied to the Texas Supreme Court for a writ of error, seeking review of the Court of Appeals' adoption of the *Culver I* "case-by-case" approach. The railroad repeatedly argued, both in its original application and in its petition for rehearing, that *Culver I* had been overruled in this respect by *Culver II*, and that it was manifestly unfair to apply the repudiated portion of *Culver I* retroactively to this case. Moreover, since in this case "the jury was neither instructed on the basis of *Culver I* principles nor did the trial judge make findings of fact based on those principles," which did not exist at the time of trial, the case should be retried before a jury on the "below-market-discount" methodology announced in *Culver II*. See Application for Writ of Error, pp. 18-19; Petition for Rehearing, pp. 9-10.

Without explanation, the Texas Supreme Court denied the application with the notation "No Reversible Error," followed by an unexplicated order denying rehearing.

REASONS FOR GRANTING THE WRIT

This case raises important questions in the administration of the Federal Employers' Liability Act. It raises the need for a uniform rule to guide juries in comprehending the consequences of inflation when calculating damages for the loss of lifetime earning capacity. And it raises a challenge by the Texas courts to the abiding purpose of the FELA to "create uniformity throughout the Union."[7]

The challenge here is in the form of a refusal to follow the federal rule, designed expressly for jury trials occurring within the geographic bounds of the Fifth Circuit,

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[7]H. Rep. No. 1386, 60th Cong., 1st Sess. 3 (1908), quoted in *Norfolk & Western R. Co.* v. *Liepelt*, 444 U.S. 490, 493 n. 5 (1980).

that governs "the adjustment [to account for inflation] of federal damage awards for future lost earnings in [jury trials in] this circuit." *Culver* v. *Slater Boat Co.*, 722 F.2d 114, 123 (*en banc* 5th Cir. 1983) (*Culver II*), *cert. denied*, 52 Law Week 3907, *sub nom. Schmidt* v. *Byrd*, No. 83-1749 (June 18, 1984).[8] Confusion and conflict mark the administration of the FELA, particularly between federal and state courts within the Fifth Circuit. This Court's clarification and guidance are urgently needed.

1. The decision below raises an important question whether a uniform method for determining lost earnings in an inflationary economy should be established for use in FELA jury trials.

This case is an exercise in adapting to jury trials the decision of this Court in *Jones & Laughlin Steel Corp.* v. *Pfeifer*, ____ U.S. ____, 103 S.Ct. 2541 (1983), a non-jury case. In *Pfeifer*, this Court examined various methods or approaches to adjusting damage awards to national inflationary trends, including the "case-by-case" method and the "below-market-discount" method. But the Court was reluctant to single out any one method as the exclusive way for calculating the inflation factor when federal judges

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[8]Another petition for certiorari arising out of *Culver II* is still pending before this Court, *sub nom. St. Paul Fire & Marine Insurance Co.* v. *Culver*, No. 83-1760, filed April 30, 1984. The first question presented in that petition is whether the opinion in *Culver II*, mandating the use of the "below market discount rate" in all civil and maritime cases, is contrary to this Court's *Pfeifer* decision. Other questions deal with the impact of *Culver II* on the plaintiff's burden of proof and on the Seventh Amendment right to a jury trial.

The only question presented in No. 83-1749, as to which certiorari was denied, read as follows: "Whether the Fifth Circuit Court of Appeals erred by ruling that, as a matter of law, the below market discount rate is the only method to be used in the (old) Fifth Circuit to adjust damage awards to account for the effects of inflation."

determine damages under the Longshoremen's and Harbor Workers' Compensation Act. The Court was not willing to impose a particular approach upon unwilling litigants, preferring to allow them to stipulate to whatever reasonable method they saw fit and to introduce expert opinion concerning the appropriate rate.

But in *Culver II,* the Fifth Circuit perceived a need to adapt *Pfeifer* to jury trials by selecting a single method for jury calculation of the inflation factor. The *en banc* Fifth Circuit accordingly selected the "below-market-discount" method to "govern the adjustment of federal damage awards for future lost earnings in this circuit." 722 F.2d at 123. The court also thought "it desirable to afford litigants and the courts the opportunity to determine the actual operation of this less complex method in order that its efficacy for national use can be determined." 722 F.2d at 122. Equally significant was the Fifth Circuit's determination that *Pfeifer* had disapproved the "case-by-case" method – the method followed in the instant case – and therefore "it should not be used in this circuit to adjust damage awards for inflation." 722 F.2d at 120.

Since Texas state courts sit within the circuit area governed by the Fifth Circuit as to matters of federal law, the instant case poses the critical question whether the "below-market-discount" method should be the exclusive way to adjust to inflation in federal personal injury actions tried by jury, such as those under the FELA. Petitioner suggests that the answer should be affirmative. If the parties are unable to stipulate a single method of calculation and if the jury instructions are opaque in this respect – as is the situation in this case – juries are simply incapable of understanding the variety of economic and statistical techniques for calculating the effect of inflation and selecting the most appropriate one for use in the case

at hand. And if the expert testimony about inflationary trends is not accurately geared to a single methodology, expressed in jury instructions, the jury can become confused and mired in competing economic data, to the point of throwing up its collective hands and awarding some lump sum divorced from discernible methodology. As the Fifth Circuit said in *Culver II,* 722 F.2d at 119:

> Different formulae, each thought to be theoretically accurate, might be applied in literally hundreds of individual cases because of the conclusions reached by different fact-finders. The results in otherwise similar cases would vary widely depending on the particular expert witnesses called, on the fact-finders' agreement or disagreement with the methods they advocated, and on the different fact-finders' evaluations of their testimony. The voyage in search of mathematical certainty would discover instead a continent of conflict and conjecture.

Moreover, establishing a uniform methodology for FELA jury trials would appear appropriate to ensure uniformity in the application of the FELA, that uniformity "throughout the country [that is] essential to effectuate its purpose." *Dice* v. *Akron, C. & Y.R. Co.,* 342 U.S. 359, 361 (1952). Without uniform jury instructions as to calculating the impact of future inflationary trends, FELA plaintiffs like Chaffin can secure widely disparate damage recoveries, dependent on the court and jury called upon to estimate the effects of inflation. Why should the FELA plaintiff, assuming all other damage factors are equal, be able to secure a much larger recovery from a state court jury untutored in inflation calculations than from a federal court jury instructed as to the "below-market-discount" method?

It has "long been settled that [jury] questions concerning the measure of damages in an FELA action are federal in character." *Norfolk & Western R. Co.* v. *Liepelt,* 444 U.S. 490, 493 (1980). Only a uniform federal rule respecting the impact of inflation on the measure of damages guarantees that "litigants under the federal act receive similar treatment in all states." *Brady* v. *Southern R. Co.,* 320 U.S. 476, 479 (1943). This case is the vehicle for establishing that uniformity of treatment of FELA litigants involved in jury trials.

2. The decision below directly conflicts with this Court's decision in Pfeifer and with the Fifth Circuit's decision in Culver II.

The conflict with *Pfeifer* is particularly acute with respect to the relevant discount rate to be used in the "case-by-case" approach. The court below permitted use of an historical 6.5% interest rate, while *Pfeifer* requires the use of an after-tax market interest rate — which in this csae would be about 11.10%, assuming all computational factors in Chaffin's favor. 103 S.Ct. at 2556.

Moreover, *Pfeifer* plainly discourages the use of the "case-by-case" methodology, since the specific forecasts of future price inflation (in this case, 9% annually for more than 30 years) upon which the methodology rests "remain too unreliable to be useful in many cases" and "will normally be a costly and ultimately unproductive waste of resources." 103 S.Ct. at 2556. The Fifth Circuit in *Culver II* relied upon those *Pfeifer* sentiments in outlawing the use of the "case-by-case" method in jury trials within that circuit, mandating instead the use of the "below-market-discount" method. Thus the Texas court's approval of the use of a flawed "case-by-case" methodology in this FELA jury trial is inconsistent with *Culver II,* as well as with *Pfeifer.*

The inflation-loaded damage award of $1,768,860 in this case reflects several serious legal problems: (a) it reflects a substantial abuse of what is considered legally acceptable when the "case-by-case" method is used; (b) it goes far beyond what is legally acceptable under the "below-market-discount" method mandated by *Culver II;* (c) it constitutes a legally excessive award for lost earning capacity, providing Chaffin with an unjustified windfall; (d) it reveals the conflict and confusion that still surround the emerging law on adjusting damage awards to account for national inflationary trends; and (e) it suggests the need for a uniform standard respecting inflation in FELA jury trials.

Neither this case nor this petition should be "converted into a graduate seminar on economic forecasting." Cf. *Pfeifer,* 103 S.Ct. at 2556. Suffice it here to say that the basic legal defect in Dr. Funderburk's treatment of the inflation factor in this case is traceable to his use of a 6.5% discount rate relative to his projected 9% annual inflation rate for 31.45 years, based on his estimate that Chaffin's annual railroad wage at the time of trial in 1981 (not at the time of injury in 1979) would have been $31,701.[9] That discount rate of 6.5% was far below the then-prevailing market intereset rate for safe investments (13.87%) and actually operated to produce a 2.5% net *increase* rate, compounded annually. The excessive result achieved by

[9]The record is conclusive that the 6.5% rate was obtained by averaging historical interest rates for U.S. Treasury securities and bank savings accounts over the period 1967 to 1980. (S.F. 289, 292-94, 322-23). Dr. Funderburk used the 6.5% rate despite his testimony that, for the month prior to trial, the inflation rate was 1.2% (or 14% if projected annually), despite his observation of a correlation between inflation and interest rates (S.F. 294), and despite his concession that, at then-current rates, Chaffin would earn 13.87% annually by investing at market in a series of safe U.S. Treasury bonds and holding them to maturiy (S.F. 341, 343-45, Def. Ex. 3).

using Dr. Funderburk's figures can be demonstrated as follows:

Methodology	Total lost railroad earning capacity discounted to present value
The Funderburk "case-by-case" method, using a 6.5% discount rate	$ 1,606,445.72
The legally acceptable "case-by-case" method, which requires use (*Pfeifer*, 103 S.Ct. at 2556) of the after-tax market interest rate (in this case, 13.87% minus 20% tax adjustment, or 11.10%)	$ 822,628.73
The "below-market-discount" method mandated by *Culver II*, which applies a 2% below-market discount rate to each yearly installment of lost wages	$ 814,052.39

Faced with Dr. Funderburk's mistaken calculations and with no instructions as to the proper legal calculation of the present value of Chaffin's lost earning capacity, the jury was virtually compelled to render an award that is almost double what is legally acceptable under either the "case-by-case" or the "below-market-discount" method. That is why the result in this case is so totally inconsistent with *Pfeifer* and *Culver II*.

Certiorari should be granted to provide more sure-footed guidance to this and all future FELA juries faced with the task of unraveling some of the mysteries of inflation. It was to that end that the Fifth Circuit promulgated its *Culver II* decision mandating the below-market approach as a solution to the difficulties that plague this and other cases and as a method of achieving greater uniformity in decisions in which the amount of damages is disputed. See Wilbratte, *Inflation and Damages in the Fifth Circuit*, 47 Texas Bar Journal 638, 640, 645 (June 1984).

3. The decision below raises important questions as to the obligation of state courts to follow changing federal decisional rules in federal statutory actions.

State courts, of course, have concurrent jurisdiction to entertain FELA causes of action. "It has long been settled that questions concerning the measure of damages in an FELA action are federal in nature," *Norfolk & Western R. Co.* v. *Liepelt,* 444 U.S. 490, 493 (1980), and that, if the action is brought in a state court, all such questions "must be settled according to general principles of law as administered in the Federal courts," *Chesapeake & Ohio R. Co.* v. *Kelly,* 241 U.S. 485, 491 (1916). In short, the prevailing federal rules for measuring damages "must be applied by state courts." *Western & Atlantic R. Co.* v. *Hughes,* 273 U.S. 496, 498 (1920).

Several novel and important questions are posed when those entrenched principles are applied in this case:

(1) Did the Texas Court of Appeals give proper effect, in affirming the damage award, to the Fifth Circuit's new rules respecting the admission and use of inflation testimony? It will be recalled that, at the time this case was tried, the Fifth Circuit's *Penrod* rule barred the introduction of any such evidence; had that rule remained in effect throughout this appeal, the trial court's action in permitting introduction of inflation testimony would have been plain reversible error. But before the appeal to the Texas Court of Appeals was completed, the Fifth Circuit announced an *en banc* overruling of the *Penrod* rule and promulgated detailed principles and procedures for utilizing the "case-by-case" methodology in the admission of inflation evidence. *Culver I,* 688 F.2d 280. The Texas Court of Appeals, citing *Culver I,* held only that the admission of inflation evidence in this case "was not error."

But *Culver I* did more than overrule *Penrod* and permit the introduction of inflation testimony. It was a studied effort to establish the "case-by-case" methodology principles and procedures for all courts throughout the circuit; and it was supplemented by the *Pfeifer* mandate to use the after-tax market interest rate in discounting future earnings when using that methodology. Yet at the trial in this case, conducted at the time when the *Penrod* rule prevailed, the petitioner railroad could offer no contrary economic data as later contemplated by *Culver I;*[10] nor was the jury instructed as to the "case-by-case" calculation as later contemplated by *Culver I;* nor was the after-tax market interest rate utilized as *Pfeifer* and *Culver I* later contemplated. In other words, the railroad lost its appeal to the Texas Court of Appeals on grounds that simply did not exist at the time of trial — a most unfair set of procedural circumstances.

(2) Did the Texas courts, including the Texas Supreme Court, give proper respect to the Fifth Circuit's overruling of the *Culver I* "case-by-case" approach and substituting, indeed mandating, the "below-market-discount" approach for use in all courts within the circuit? Obviously not. Such disregard of the superior federal law by state courts only heightens the unfairness that has marked this litigation from the start. The only remedy at this point is a reversal and remand to the Texas Court of Appeals, so that a new trial may be had in accordance with the con-

[10]The petitioner railroad was between the rock and the hard place at the time of trial. Since the *Penrod* ban on introducing inflation projections and testimony was then in place, petitioner was forced to object to all such evidence introduced by Chaffin. But even if petitioner could have foreseen the overruling of *Penrod* and introduced its own expert testimony to contradict Dr. Funderburk, petitioner at that time would have been held to have waived its objection to Dr. Funderburk's testimony. 1 R. Ray, *Texas Law of Evidence,* Sec. 27, at 36 (3d ed. 1980).

trolling federal principles of damage computation announced in *Culver II* and *Pfeifer*.

(3) In adoping a single method of adjusting future damage awards, *Culver II* stated that the new method "shall not apply to any case in which, before the date this opinion was published [Dec. 22, 1983], either a jury returned a verdict after being instructed on the basis of the principles set forth in *Culver I*, or a judge made findings of fact fixing damages pursuant to those principles." 722 F.2d at 123. Neither event occurred at the trial of this case. A remand for reconsideration and retrial in light of *Culver II* thus seems appropriate. Since *Culver II*, the Fifth Circuit has remanded several federal non-jury cases for such reconsideration. E.g., *Ober* v. *Penrod Drilling Co.*, 726 F.2d 1035, 1037 (5th Cir. 1984) ("Since *Culver II* specifically adopts the below-market-discount method, this Court must remand for readjustment of plaintiff's damage award [and application of] the principles of *Culver II* in adopting the discount rate"); *Nesmith* v. *Texaco, Inc.*, 727 F.2d 497, 498 (5th Cir. 1984) (same); *Martin* v. *Missouri Pacific R. Co.*, 732 F.2d 435, 436 (5th Cir. 1984) (same); and see *Madore* v. *Ingram Tank Ships, Inc.*, 732 F.2d 475, 478 & n. 2 (5th Cir. 1984).[11] And in *Culver II* itself, a jury-tried case, the Fifth Circuit remanded for further trial proceedings on the issue of damages. 722 F.2d at 123.

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[11] In the *Madore* case, the plaintiff's expert had persuaded the trial court to use a 6.56% discount rate for future lost earnings of a Jones Act seaman with a 25.8 year worklife expectancy. This rate ws derived from a 21-year historical average of Treasury bill rate, whereas the market interest rate at the time of trial was 10.25%. The Fifth Circuit reversed and remanded for a recalculation of damges pursuant to the *Culver I* "case-by-case" methodology. The Fifth Circuit noted that *Pfeifer's* reference to "market rate interest" under that methodology means the rate available when the suit is tried and not an historical rate — as was indeed used in the instant case.

A retrial under these circumstances would comply with the three factors relevant to the retroactivity question, as summarized in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 106-107 (1971). First, the decision to be applied "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." Here, there can be no question that *Culver I,* in overruling *Penrod,* established a new principle of law contrary to the one upon which the litigants had relied. And it took an unanticipated *en banc* overruling of *Culver I* to establish an even newer principle of law that was even more contrary to the principle relied upon at trial.

Second, *Chevron Oil* stresses that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Enough has been said by this Court and by the Fifth Circuit to demonstrate (a) the merits of the "below-market-discount" rule, and (b) the demerits of the repudiated *Penrod* rule and the "case-by-case" method.

Third, *Chevron Oil* requires a weighing of the inequity imposed by retroactive application of the new rule, so as to avoid injustice or hardship. But here the only impact on the plaintiff Chaffin would be to deprive him of a legally unwarranted windfall, hardly an inequity.

Retroactive application of the *Culver II* decision seems eminently just to the litigants in this case. Otherwise, the important FELA goal of uniformity in application would be frustrated. And an unfortunate precedent would be created for producing "different results for breaches of duty in situations that cannot be differentiated in policy."

Moragne v. *States Marine Lines,* 398 U.S. 375, 405 (1970), quoted in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 417 (1975).

CONCLUSION

For these various reasons, the petition for certiorari should be granted, to the end of remanding the case for a new trial to compute the damages suffered from the loss of future earning power in accordance with controlling federal principles.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,

v.

Benny K. CHAFFIN, Appellee.
No. 9062.

Court of Appeals of Texas,
Texarkana.

July 19, 1983.

Rehearing Denied Aug. 16, 1983.

C.B. Wheeler, William C. Gooding, Wheeler, Gooding & Dodson, Texarkana, for appellant.

Franklin Jones, Jr., Jones, Jones & Baldwin, Marshall, Harold Nix, Daingerfield, for appellee.

HUTCHINSON, Justice.

Benny K. Chaffin (Chaffin), here appellee, sued his employer, Kansas City Southern Railway Company (K.C. So. Ry.), here the appellant, under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. (1972) for damages for injuries allegedly sustained in his employment by K.C. So. Ry. Prior to trial, K.C. So. Ry. admitted liability leaving the amount of damages, if any, as the sole issue for determination. This issue was heard by and submitted to a jury. The jury by its verdict assessed the damages in the amount of One Million Seven Hundred Sixty-eight Thousand Eight Hundred Sixty and no/100 Dollars ($1,768,860.00). The trial court entered judgment on the verdict, allowing an offset of Two Thousand Seven Hundred Fifty and no/

100 Dollars ($2,750.00) for monies theretofor advanced to Chaffin.

K.C. So. Ry. by its first point of error contends that the judgment must be reversed because the trial court erred in admitting evidence as to the effects of inflation on Chaffin's claim for loss of earning capacity in the future. In support of this assertion, counsel relies upon the Penrod Rule established in this federal circuit by the case of *Johnson v. Penrod Drilling Company,* 510 F.2d 234 (5th Cir.1975), *cert. denied,* 423 U.S. 839, 96 S.Ct. 68, 46 L.Ed.2d 58 (1975). This cited case clearly bans the admission of evidence of inflationary conditions in Jones Act and F.E.L.A. based damage suits. However, the recent case of *Culver v. Slater Boat Co.,* 688 F.2d 280 (5th Cir.1982), expressly overrules this part of the Penrod case. The Court in *Culver* held:

> ". . . that Penrod's prohibition of any consideration of inflationary factors is unfair to plaintiffs and is therefore overruled . . . plaintiffs should be permitted to establish by factual economic and labor data, and expert testimony, that their income would probably continue to increase in response to inflation in future years if they continued to work. Likewise, using economic and labor data and expert testimony, the defendant should be permitted to rebut such evidence." *Culver,* supra, 688 F.2d at 305.

In view of this recent case, it is evident that the admission of inflation evidence was not error.

K.C. So. Ry. next contends that the trial court erred in allowing the admission of testimony from its witness upon cross-examination regarding his pay scale at K.C. So. Ry. from 1942 until the time of this trial. This point of error should be disposed of under the same reasoning set forth

on the rejection of the preceding point of error. The wage scale of a co-worker is evidence which is likely to show the relative increase in wages as compared to the rate of inflation. The complaint of remittances is not a valid complaint since any competent evidence, not privileged, is admissible if it logically tends to prove or disprove a material fact in issue. Here, the fact in issue is Chaffin's future wage rate. When evidence is offered which tends to prove a fact issue it is admissible and its probative effect becomes a question for the jury to pass upon. *Meredith v. Eddy,* 616 S.W.2d 235 (Tex.Civ.App. – Houston [1st Dist.] 1981, no writ). The second point of error is therefore denied.

Chaffin received a general discharge from the Navy in 1972 because he had been absent without leave from his assignment. On his cross-examination, counsel for K.C. So. Ry. approached the bench and requested a ruling from the court relative to the questioning of Chaffin concerning his discharge. It was then argued that such questioning was relevant to show the reason for such discharge and that such testimony would be probative of his reliability as an employee. Chaffin's counsel then argued that the discharge was too remote to be relevant to any issue in the case. The trial court sustained the position of Chaffin's counsel and excluded the testimony.

The record shows that the general discharge occurred almost ten years prior to this trial and that Chaffin had been employed by K.C. So. Ry. for over five years. No evidence was presented as to Chaffin's failure to properly and timely perform his duties of employment to K.C. So. Ry. If the general discharge and the reason therefore should have been admitted for evidence, it appears that such error was harmless.

In point of error number four, K.C. So. Ry. states that the trial court erred and abused its discretion in allowing

Chaffin's counsel, over objection, to testify to the jury as to circumstances of a lawsuit tried sixteen years before.

The case of *Standard Fire Ins. Co. v. Reese,* 584 S.W.2d 835 (Tex.1979), cited and relied upon by K.C. So. Ry., held that in the case of improper jury argument the complainant has the burden to prove (1) an error (2) that was not invited or provoked (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, and (4) was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the judge, and (5) that the argument by its nature, degree, and extent constituted reversible, harmful error.

That portion of the jury argument complained of has been reviewed in light of the above authority and no reversible error has been found. Too, if any error existed, it was cured by the trial court's instruction, and its observance, not to testify as to the facts in the prior lawsuit.

K.C. So. Ry.'s next point of error is based upon the trial court's refusal to grant a mistrial becuase of jury misconduct or misconduct of another person that affected a juror.

During a noon break, Billy Pope, the father-in-law of Chaffin, had a conversation with one of the jurors, Mr. Hamilton, who later was made foreman of the jury. According to Mr. Pope, the conversation concerned their places of residence and the fact that he raised some cows and that "the price of them was cheap and that you couldn't make any money on them." Mr. Gardner, Claims Agent for K.C. So. Ry., commented that he heard Mr. Hamilton say "The price is always going up, too." Mr. Pope testified that during the trial he sat with his daughter, Mrs. Chaffin, along with his wife and grand-

children. The trial judge overruled the motion for a mistrial and stated that he did not find anything wrong with the conversation. He admonished Mr. Pope to not associate with any of the jurors in the future.

A movant for a new trial based on jury misconduct must establish the following: (1) that misconduct occurred; (2) that it was material misconduct; and (3) that based on the record as a whole the misconduct probably resulted in harm to the movant. The question of whether an act of jury misconduct occurred is a question of fact to be determined by the trial judge. Tex.R.Civ.P. 327; *Flores v. Dosher,* 622 S.W.2d 573 (Tex.1981). The trial court has cosiderable latitude in granting a new trial for jury misconduct and its refusal to grant a new trial upon an expressed or implied finding that no jury misconduct occurred is ordinarily binding on the reviewing courts and will be reversed only where a clear abuse of discretion is shown. *State v. Wair,* 163 Tex. 69, 351 S.W.2d 878 (1961); *Shop Rite Foods, Inc. v. Upjohn Co.,* 619 S.W. 2d 574 (Tex.Civ.App. – Amarillo 1981, writ ref'd n.r.e.). Casual improper remarks are harmless where there is no evidence that jurors related the remarks to the case before them. *Gulf Coast Sailboats, Inc. v. Mcguire,* 616 S.W.2d 385 (Tex.Civ.App. – Houston [14th Dist.] 1981, writ ref'd n.r.e.). This point of error is therefore overruled.

K.C. So. Ry. next complains of the trial court's failure to instruct the jury that Chaffin was under a duty to mitigate his damages by resuming gainful employment, if able to do so. It bases this on the contention that Chaffin was capable of obtaining a job more rigorous and higher paying than his position as a school bus driver.

There is absoluely no evidence within the record which indicates that Chaffin either refused or avoided work of

the type suggested by K.C. So. Ry. No evidence shows that Chaffin refused or avoided appropriate medical treatment or failed to consult a doctor and follow medical advice in the manner expected of any reasonably prudent individual. Nor was there any request by K.C. So. Ry. or refusal by Chaffin to undergo a re-employment physical to determine Chaffin's fitness to return to his former job. Other than mere speculation and hypothetical situations, no medical expert or other witness testified that Chaffin was actually capable of obtaining employment other than his current position as a part-time bus driver. Thus, the trial judge properly denied the requested instruction on mitigation of damages.

Additionally, even if there had been some evidence introduced at trial sufficient to raise the issue of mitigation, this point was not properly preserved for review. K.C. So. Ry.'s objection to the charge failed to specifically object and distinctly point out the matter it was objecting to, i.e. failure to include mitigating considerations within the issue of loss of earning capacity. Tex.R.Civ.P. 274. Alternatively, K.C. So. Ry. would be required to tender a substantially correct instruction to be included in the charge on this issue. Tex.R.Civ.P. 279. The instruction submitted to the trial court by K.C. So. Ry. is not a correct statement of the law and was properly denied by the trial judge. The cases cited by K.C. So. Ry. refer to the duty of the injured person to care for and treat his injuries as a reasonably prudent person would under like circumstances. See, e.g. *Moulton v. Alamo Ambulance Service, Inc.*,414 S.W.2d 444 (Tex.1967). That problem is not present in this case. K.C. So. Ry.'s requsted charge is improper because it has the effect of completely precluding recovery for loss of future earnings "after the date on which he was . . . able to return to some form of gainful employment." *Donada v. Power,* 184 S.W. 793, 797, modified 186 S.W. 871 (Tex.

Civ.App.1916, writ ref'd); 17 Tex.Jur.2d *Damages* § 289 (1960). Even if the evidence showed that Chaffin had failed to work for personal reasons having nothing to do with the injury sustained as a result of K.C. So. Ry.'s negligence, loss of earnings or earning capacity should not be omitted from the damage issue. *Union Carbide Corporation v. Gayton,* 486 S.W.2d 865 (Tex.Civ.App. — Houston [14th Dist.] 1972, writ ref'd n.r.e.). Even if the trial court attempted to correct the incorrect instruction, there was no evidence as to what earning capacity Chaffin is alleged to currently possess, other than his income as a bus driver, such that the requested instruction on mitigation would still be inappropriate. This point of error is denied.

K.C. So. Ry. next complains of the alteration of the *Wall Street Jounral* exhibit through highlighting certain portions of an article. K.C. So. Ry. speculates that the alteration was the action of Chaffin's counsel during a court recess. There is no evidence in the record supporting this accusation. In fact, no objection or mention was made of the incident at the trial court level and K.C. So. Ry. admits in its brief that it first became aware of the highlighting of the exhibit after the case was brought up on appeal. K.C. So. Ry. neither presents nor alleges an error made by the trial court, therefore this point is without merit.

K.C. So. Ry. urges that the amount of the verdict and the judgment is grossly excessive. In reviewing excessiveness, we look only at the evidence which is favorable to the award and if there is any evidence to sustain it, findings of the jury with regard thereto will not be disturbed on the ground of excessiveness. *Allen v. Whisenhunt,* 603 S.W.2d 242 (Tex.Civ.App. — Houston [14th Dist.] 1980, writ dism'd). The following is considered: an appellate

court should not substitute its judgment for that of the jury; in the absence of an affirmative showing of bias, prejudice, or other improper motive, we give every intendment to evidence supporting the verdict; and the judgment of the jury is as good as that of the court and it should prevail unless it appears that the verdict is influenced by passion, prejudice, or some other improper motive and is not the result of deliberate, conscious and honest convictions. *Green v. Hale,* 590 S.W.2d 231 (Tex.Civ.App. — Tyler 1979, no writ); *Eans v. Grocer Supply Co., Inc.,* 580 S.W.2d 17 (Tex.Civ.App. — Houston [1st Dist.] 1979, no writ). Since K.C. So. Ry. has failed to make a showing of bias, prejudice, passion, or any other improper motive, the point of error is denied.

Finally, K.C. So. Ry. raises cumulative error. Since we found no error or only harmless error in K.C. So. Ry.'s eight previous points of error, the errors are neither so abundant nor so pronounced as to warrant a new trial on the basis of cumulative error. The errors in their aggregate and cumulative effect were not reasonably calculated to cause nor is it likely that they probably did cause the rendition of an improper verdict. *United States Fidelity & Guaranty Co. v. Lewis,* 266 S.W.2d 194 (Tex.Civ.App. — Texarkana 1954, writ ref'd n.r.e.). We overrule this point.

The judgment of the trial court is affirmed.

APPENDIX B

JUDGMENT

BE IT REMEMBERED that on Tuesday the 19th day of July, A.D. 1983, the Court of Appeals for the Sixth Supreme Judicial District of Texas met in the City of Texarkana. Present William J. Cornelius, Chief Justice, Bun L. Hutchinson, Associate Justice, Charles Bleil, Associate Justice, and Louise Waldrop Lohse, Clerk, when the following proceedings, among others, were had, to wit:

Kansas City Southern Railway Company --------- Appellant	)	Appealed from the 76th
No. 9062 v.	)	Judicial District Court
Benny K. Chaffin ---------- Appellee	)	of Morris Conty, Texas

THIS CAUSE came on to be considered on the transcript of the record, the statement of facts, and upon the briefs and oral argument of the parties; and the Court, after considering the same, is of the opinion and finds there was no error requiring reversal in the judgment of the Court below.

It is accordingly CONSIDERED, ORDERED AND ADJUDGED that the judgment of the trial court of November 25, 1981, be, and hereby is, in all things AFFIRMED, in conformity with the written opinion of this Court of even date on file herein; that appellee Benny K. Chaffin shall recover of and from appellant Kansas City Southern Railway Company and the surety upon its supersedeas and appeal bonds, St. Paul Fire and Marine Insurance Company, the full amount of his judgment in the Court below; that Kansas City Southern Railway Company and St. Paul Fire and Marine Insurance Company shall pay all costs expended in behalf of this appeal, whether in this Court or in

the Court below, for which let execution issue; and that this judgment be certified to the Court below for observance.

APPENDIX C

COURT OF APPEALS
STATE OF TEXAS
SIXTH SUPREME JUDICIAL DISTRICT

August 16, 1983

Hon. C.B. Wheeler
Hon. William C. Gooding
Wheeler, Gooding & Dodson
P.O. Box 1838
Texarkana, Texas 75504

Hon. Franklin Jones, Jr.
Jones, Jones & Baldwin
P.O. Drawer 1249
Marshall, Texas 75670

Hon. Harold Nix
P.O. Box 679
Daingerfield, Texas 75638

Gentlemen:

Re: No. 9062 – Kansas City Southern Railway Company
v. Benny K. Chaffin

The Court entered its order this date in the referenced proceeding whereby Appellant's Motion for Rehearing was OVERRULED.

PLEASE TAKE DUE NOTICE HEREOF.

Sincerely yours,

LOUISE WALDROP LOHSE, CLERK

/s/ Joyce Kastler
By: Joyce Kastler
Deputy Clerk

APPENDIX D

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

February 15, 1984

WHEELER, GOODING & DODSON
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Mr. Harold Nix, Attorney
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Daingerfield, Texas 75638

Re: No. C-2462, KANSAS CITY SOUTHERN RAILWAY COMPANY vs. BENNY K. CHAFFIN

Dear Attorneys:

The application for writ of error in the above-referenced case was this day refused with the notation, No Reversible Error.

Very truly yours,

GARSON R. JACKSON, Clerk

By /s/ Fritzi Born, Deputy
Britzi Born

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

March 14, 1984.

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Mr. Harold Nix, Attorney
P.O. Box 679
Daingerfield, Texas 75638

Dear Sirs:

The motion for rehearing in the case of KANSAS CITY SOUTHERN RAILWAY COMPANY vs. BENNY K. CHAFFIN, No. C-2462, was this day overruled.

Very truly yours,

/s/ Garson R. Jackson
Garson R. Jackson, Clerk

APPENDIX E

COURT OF APPEALS
STATE OF TEXAS
SIXTH SUPREME JUDICIAL DISTRICT

April 10, 1984

Hon. William C. Gooding
Wheeler, Gooding & Dodson
P.O. Box 1838
Texarkana, Texas 75504

Hon. Franklin Jones, Jr.
Jones, Jones & Baldwin
P.O. Drawer 1249
Marshall, Texas 75670

Hon. Harold Nix
Attorney at Law
P.O. Box 679
Daingerfield, Texas 75638

Gentlemen:

Re: No. 9062 – Kansas City Southern Railway Company
v. Benny K. Chaffin

The Court entered its order this date in the referenced proceeding wherby Appellant's Motion for Stay of the Mandate Pending Disposition by the Supreme Court of the United States of a Petition for a Writ of Certiorari was GRANTED.

Sincerely yours,

LOUISE WALDROP LOHSE, CLERK

/s/ Lynda Poore
By: Lynda Poore
Deputy Clerk

APPENDIX F

No. 12,852

BENNY K. CHAFFIN	/	IN THE DISTRICT
VS.	/	COURT OF
KANSAS CITY SOUTHERN RAILWAY COMPANY	/	MORRIS COUNTY, TEXAS

On the 10th day of November, 1981, came on to be heard the above entitled and numbered cause, and all parties appeared, both in person and by and through their attorneys of record, and announced ready for trial, and a jury was previously selected on the 4th day of November, 1981, composed of George Hamilton as Foreman, and eleven others, duly qualified, such jury being empaneled and sworn, and upon the close of the evidence, the Defendant did stipulate into the record that it was fully liable for the injuiries sustained by the Plaintiff on the 2nd day of August 1979, and after considering the pleadings, evidence, and argument of counsel, the jury did receive the charge of the court and return into open court on the 12th day of November, 1981, its verdict assessing Plaintiff's damages for the injuries received by him on August 2, 1979, in the amount of One Million Seven Hundred Sixty Eight Thousand Eight Hundred and no/100 Dollars ($1,768,860.00).

The verdict of the jury was received and filed by the Court, and after having allowed Defendant an offset of Two Thousand Seven Hundred Fifty and No/100 Dollars ($2,750.00) for monies heretofore advanced the Plaintiff, and in consonance with the verdict of the jury, it is ORDERED, ADJUDGED and DECREED by the Court that the Plaintiff have and recover the sum of One Million

Seven Hundred Sixty Six Thousand One Hundred Ten and No/100 Dollars ($1,766,110.00), together with the costs of suit, for interest on such judgment from this date until its satisfaction, for all of which execution shall issue.

SIGNED AND ENTERED this 25 day of Nov. 1981.

/s/ B.D. Moye
JUDGE PRESIDING

APPENDIX G

EXCERPTS FROM INSTRUCTIONS TO JURY

You are instructed that any damage award is not subject to federal income tax, and that you should not consider such taxes in fixing the amount of any award. You should state your award net of any taxes, i.e., the earnings after taxes have been deducted.

You are instructed that in considering Plaintiff's work life expectancy you should take into consideration the fact that not all persons live to the age of expectancy, that a person may choose (or may be forced) not to work all the years of his work life, and that other factors may change the time a person works. Factors that may be considered include possible illness, retirement (compulsory or voluntary), the nature and hazards of Plaintiff's employment, other accidents, death, or other matters that might tend to increase or decrease Plaintiff's work life expectancy.

The burden of proving Plaintiff's injuries and any damages resulting therefrom is upon the Plaintiff. He is required to prove his injuries and each item of damage by a preponderance of the evidence.

The Defendant has admitted that it is liable for the injuries received by the Plaintiff on August 2, 1979. Accordingly, your only duty in this case will be to assess appropriate damages under the applicable law.

In assessing the amount of damages which Plaintiff, Benny Chaffin, has suffered, if any, you are instructed that you will take into consideration the nature, extent and duration of his injuries, if any, which resulted in the collision which occurred on August 2, 1979, and the following items of damage, but none other:

a) The loss of earnings which the Plaintiff has sustained as a result of the collision in question from the date of the collision to the present time, if any.

b) The loss of earning capacity which the Plaintiff will in reasonable probability sustain in the future as a result of his injuries, if any.

c) The physical pain and mental anguish that the Plaintiff has endured from the date of the collision in question to the present date, if any; and

d) The physical pain and mental anguish which the Plaintiff in reasonable probability will endure in the future as a result of his injuries, if any.

In arriving at any amount that you allow the Plaintiff by reason of the impairment or decrease in his earning capacity or ability to earn money in the future, you will allow only the present value thereof, and make your calculations of the same on the basis of the amount found by you bearing interest at the highest rate of interest prevailing at the time and place of trial that can be had on money safely invested and secured.

In summary, you should award such sums as you find from a preponderance of the evidence to be reasonable to compensate the Plaintiff for the injuries, if any, he received on August 2, 1979, taking into consideration the elements above set forth and none other.

ANSWER IN DOLLARS AND CENTS
answer: $1,768,860.00.

No. 84-58

In the Supreme Court of the United States

October Term, 1984

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

BENNY K. CHAFFIN,
Respondent.

BRIEF IN RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS, AT TEXARKANA, TEXAS

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19 pp

QUESTIONS PRESENTED

The State Court, following the guidelines of this Court's pronouncements in *Liepelt* (*Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 775, 62 L.Ed. 2d 689 (1980)), admitted evidence of inflation on the question of Respondent's future earnings loss in this Federal Employers Liability Act jury trial. The Texas Courts neither approved nor disapproved any specific approach to adjusting damage awards to account for inflation in F.E.L.A. jury trials, and such interpretation of the opinion below is not possible. There was no contention in the Texas Trial Court or the Texas Court of Appeals that Respondent's award should be adjusted to account for inflation "according to the below market discount rate". Accordingly, the only Questions Presented for Review are:

1. Did Petitioner preserve for review the issues which it urges here for the grant of certiorari?

2. Have the Texas Courts "challenged" the prevailing Federal law with respect to adjusting damage awards to account for future inflation in State Court F.E.L.A. jury trials?

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No. 84-58

In the Supreme Court of the United States

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vs.

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Respondent.

BRIEF IN RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS, AT TEXARKANA, TEXAS

STATEMENT OF THE CASE

This case was tried to a jury in mid-November, 1981 on the issue of damages only. The highly intricate arguments advanced for the first time in Petitioner's Application for Writ of Error to the Texas Supreme Court, and in its Petition for Certiorari in this Court, attack this simple, one sentence holding by the Texas Court of Appeals:

> "* * * in view of this recent case (*Culver v. Slater Boat Co., infra*), it is evident that the admission of inflation was not error." (Op. of Court of Appeals of Texas, p. 2a, Appendix A).

Briefly summarized, the Petitioner's complaints here are that the Texas courts have done violence to the uni-

form administration of the Federal Employers Liability Act by approving an approach to adjusting damage awards to account for future inflation which is not consistent with controlling Federal law. This complaint focuses upon Petitioner's contention that Respondent's economic expert used the wrong discount rate to reduce lost future wages to present value.

These complaints can be defeated substantively, but part of the problem in dealing with them is the procedural context in which they are urged.

Respondent used an expert economist, Dr. Funderburk, to estimate the discounted value of future wages to be lost by Respondent through Petitioner's admitted negligence. (II S.F. 278, et seq.). Dr. Funderburk explained the procedures by which he computed those damages in explicit and understandable detail. (II S.F. 278-311). The railroad did not choose to challenge Dr. Fundreburk's methods and formulas by offering in opposition an expert of its own. It was content to rely upon its cross-examination of Respondent's expert.

Petitioner alibis now for not countering Respondent's expert testimony at the trial on the premise that to have done so would have waived its objection to the overall admissibility of the evidence of inflation. (Pet. for Certiorari, p. 22, n.10). Such is simply not the Texas law.[1]

At the trial, the *only* issue made over the computation of damages was whether it was permissible, in F.E.L.A. cases, for the jury to consider the effect inflation would

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1. *Roosth & Genecov Production Co. v. White,* (Tex. S.Ct. 1953) 262 S.W.2d 99 at 104, holding that defensive maneuvers such as cross-examination and offering rebuttal testimony do not waive objection to inadmissible evidence. Accord *E.L. Cheeney Company v. Gates,* 346 F.2d 197 (5th Cir. 1965). *This principle is noted in footnote 45, p. 37 of the text cited by Petitioner.* (1 R.Ray, Texas Law of Evidence, Sec. 27 at p. 37 (3rd Ed. 1980)).

have upon future earnings lost. (Petitioner's Motion in Limine, §5, Tr. p. 70). Dr. Funderburk did figure inflationary factors into his calculations of lost future earnings. (II S.F. 282-287). In response to that, the *only* objection the Petitioner made to any aspect of Dr. Funderburk's testimony, his procedures, or his conclusions was as follows:

"Q. Dr. Funderburk, I think all of us know and understand what it means but for the record what are we talking about specifically when we all talk about 'inflation'? What is 'Inflation'?

A. Inflation really is just—

MR. GOODING: Excuse me.

At this time we are going to renew our objection to the discussion of inflation because it is a field that is purely speculation, open to conjecture and we are going to renew our Motion in Limine at this time.

I object to it.

And furthermore we object because of any indirect relationship through salary and wage increases.

THE COURT: Overruled.

MR. NIX: I'm sorry.

MR. GOODING: May we have a continuing objection to that so I won't have to continue interrupting him?" (II S.F. 284, lines 1-20).

In the Court of Appeals, the *only* Point of Error the railroad brought forward relating to the question of damages and inflation was this one:

"POINT OF ERROR NO. ONE

Judgment must be reversed because the trial court erred in admitting evidence as to the effects of inflation on Chaffin's claim for loss of earning capacity in the future." (Brief of Appellant in Court of Appeals, p. 2).

Petitioner requested no instructions from the trial court to the jury on guidelines it should use concerning the evidence of future inflation, and made no objection to the court's charge for failure to more fully instruct the jury on the methodology it should apply in handling this evidence. Neither did it object to the discount rate used by Dr. Funderburk in his calculations. It made no objection to the effect that the trial court was following the wrong methodology or that it should use a different approach. All of these steps were procedurally prerequisite to preserve the Points now urged on appeal.

THE SUMMARY OF THE ARGUMENT

This was a State court jury tried F.E.L.A. case. At the time the case was tried, Petitioner sought to blindfold the jury regarding the phenomenon of national inflation. Petitioner placed utter and complete reliance on the discredited and doomed *Penrod*[2] rule, which at the time of the trial, the Fifth Circuit was re-examining *en banc*. The trial court elected to follow this Court's dicta in *Liepelt, supra*, as well as what was emerging at the time as the majority rule amongst the circuits, and admitted expert testimony concerning the impact of inflation on Respondent's future earnings loss. Petitioner elected not to rebut

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2. *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir. 1975) (*en banc*), cert. denied, 423 U.S. 839, 96 S.Ct. 68 (1975).

this testimony, or object to the methods used by Respondent's expert in reaching his conclusions. It waived any complaint on the subject other than that the evidence was not admissible *for any purpose*. As almost any fool could have seen, the carcass of *Penrod* was headed for, and now rests in a well deserved and unlamented grave. Evidence of inflation is, and always has been, admissible in these circumstances. There is no issue before the Court for review, and this Petition is a rank trespass upon the Court's time.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The Complaints Embodied in the Petition for Certiorari Were Not Properly Preserved in the Courts Below.

From a procedural standpoint, it is quite clear that the only issue preserved for review and the *only* issue before the Court of Appeals, was the broad question of whether "inflation" can be taken into account as a generic factor in computing an injured worker's lifetime future earnings loss in an F.E.L.A. case. That narrow issue was the *only* one decided by the lower court. To say that the lower court approved the "case by case" approach to adjusting damage awards in F.E.L.A. cases is simply not correct.

It is apparent from a quick reading of the Petition for Certiorari that the Petitioner no longer seriously contests the admissibility of "inflation" and its impact on future wage loss. In the Texas Supreme Court, and in this Court, the Petitioner quietly abandons its previous argument and diverts its attack upon the "methodology"

by which the inflationary factors were used to compute future earnings loss; more particularly, upon the criteria for selecting the proper rate by which to discount that loss to present value.

We must respectfully suggest, therefore, that the specific complaints advanced in the Petition for Certiorari are not properly preserved for review for these reasons:

1. The complaints were waived by failing to object in the trial court to the procedures and criteria by which Dr. Funderburk arrived at his estimate of future earnings loss. *Port Terminal Railroad Association v. Inge,* 524 S.W.2d 801, 803 (Tex. Civ. App., 1975, no writ); *Montgomery Ward & Co. v. Marvin Riggs Co.,* 584 S.W.2d 863, 868 (Tex. Civ. App., 1979, writ ref., n.r.e.); *Cobb v. Thomas,* 565 S.W.2d 281, 288-289 (Tex. Civ. App., 1978, writ ref., n.r.e.). If the "methodology" now attacked was truly a fatal legal flaw in Dr. Funderburk's expert conclusion, Respondent and the trial court were entitled to a specific objection defining the supposed defect so that the matter could be corrected at trial. The denial of this opportunity, the attempt to ambush the judgment with objections raised for the first time in this Court and the Texas Supreme Court, is a classic ground for waiver of an objection to testimony. *Texas Municipal Power Agency v. Berger,* 600 S.W.2d 850, 854-855 (Tex. Civ. App., 1980, no writ); *Wilkins v. Royal Indemnity Co.,* 592 S.W.2d 64, 68 (Tex. Civ. App., 1979, no writ).

2. Furthermore, the complaints here made were waived by absence of a point of error in the Court of Appeals specifically pointing out the "methodology" defects with the same detail as they are alleged and argued in this Court. The broad complaint embodied in "Point of Error No. One" below raised a single, broad issue - the admissibility of inflation factors, *vel non.* The minute,

specific, technical, and different complaints advanced in the Petition for Certiorari cannot be said to have been included in the single complaint in the Texas Court of Appeals, either directly or by inference. Such minimal specificity is essential to proper preservation for appellate review. Rule 418 (d), Tex. R. Civ. Proc.; *State v. Bilbo,* 392 S.W.2d 121, 126 (Tex. 1965); *Edwards v. Strong,* 147 Tex. 155, 213 S.W.2d 979, 980 (1948); *Elliff v. Texon Drilling Co.,* 146 Tex. 575, 210 S.W.2d 558 (1948).

The Texas law that requires a party complaining of evidentiary errors to have preserved the point both in the trial and intermediate appellate courts mirrors the Federal rule which was succinctly stated in *Colonial Refrigerated Transportation, Inc. v. Mitchell,* (5th Cir.) 403 F.2d 552, thus:

> " 'It is fundamental that where an objection is specific it is deemed to be limited to the ground or grounds specified and it does not cover others not specified'. Knight v. Loveman, Joseph & Loeb, Inc., 5 Cir. 1954, 217 F.2d 717, 719. *The burden was on the defendants' counsel to make a timely request that the court properly limit the admissibility of the evidence and properly charge the jury with respect to the manner in which it was to be considered.* Camps v. New York City Transit Authority, 2 Cir. 1958, 261 F.2d 320. Failure to do so constituted a waiver of the objection. Complete Auto Transit, Inc. v. Wayne Broyles Engineering Corp., 5 Cir., 1965, 351 F.2d 478." (Emphasis supplied).

To apply a different standard would permit a party to:

> " 'Sit idly by and allow the trial court to commit error, wait for a verdict, and complain of the error only if the verdict is unfavorable.' (Skogen v. Dow

Chemical Company, 375 F.2d 692, 703, citing Crusan v. Ackman 342 F.2d 611, 7th Cir. 1965)."

It is clear that certiorari should not be granted here, simply because the Court would have nothing to review.

II. The Narrow Ruling of the Courts Below Is in Accord With Every Federal Ruling on the Issue, and Challenges Nothing.

The Texas Trial Court and the Court of Appeals were asked by Petitioner to rule on one, and only one question: Is, or is not, evidence of inflation admissible *for any purpose* in a State Court F.E.L.A. jury trial? The Court of Appeals ruled only that the admission of this testimony was not error. This simple ruling is totally congruent with the authoritative pronouncements of this Court, and virtually every other Federal court in the land. To say it challenges the uniformity of administration of the F.E.L.A. is to pipe dream.

When this case was tried, this Court had given a clear signal to the Judiciary of this land charged with the administration of the Federal Employers Liability Act that the impact of inflation was a proper factor generally to be considered by the finders of fact in assessing damages. We illustrate:

> "* * * (F)uture employment itself, future health, future personal expenditures, future interest rates, and *future inflation* are also matters of estimate and prediction. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that

> are increasingly familiar with the complexities of modern life. * * *" (*Norfolk and Western Railway Co. v. Liepelt*, 444 U.S. at 495, 62 L.Ed.2d at 694, emphasis added).

Given the trial court's respect for the pronouncements of this Court when they seemingly conflict with the much criticized and inflexible *Penrod* rule, a rule that had already received national rebuke, and had been rejected by most circuits which considered it,[3] it seems that there is little wonder that the trial court opted to rule consistently with the supreme law of the land. Indeed, the trial court's actions were nothing more than its concerted efforts to bring the Texas Courts in line with this Court's pronouncements.[4]

To suggest that the actions of the courts below represent a situation where the Texas Courts are attempting to "challenge" this Court's interpretation of Federal law is totally uncalled for, and does a disservice to those courts' efforts to enforce the Federal Employers Liability Act fairly and even handedly. The atmosphere in which the trial court acted was one in which he was confronted with a situation where this Court in the well reasoned *Liepelt dicta*, had, in effect, spelled the death knell for the ill-reasoned, inflexible and unfair *Penrod* rule, and

---

3. *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30 (2d Cir. 1980); *Steckler v. U.S.*, 549 F.2d 1375 (10th Cir. 1977); *U.S. v. English*, 521 F.2d 63, 72 (9th Cir. 1975); *Bach v. Penn. Central Transportation Co.*, 502 F.2d 1117, 1122 (6th Cir. 1974); *Rains v. Diamond M. Drilling Co.*, 396 So.2d 306 (La. App. 1981); and *Culver v. Slater Boat Co.*, 644 F.2d 460 (5th Cir. 1981), 688 F.2d 289 (*en banc* 5th Cir. 1982) (*Culver I*).

4. Note that if the State Trial Court had ignored the *Liepelt dicta*, and adhered to *Penrod*, it would have been reversible error under the *Culver* opinions. This is precisely the result which occurred where a Federal District Court excluded Dr. Funderburk's testimony on the basis of *Penrod* in another F.E.L.A. case. See *Martin v. Missouri Pacific Railroad Co.*, 732 F.2d 435 (5th Cir. 1984).

he was forced to make a choice. It is abundantly clear that when State courts perceive that a circuit court in its geographic area is out of line with the holdings of this Court, its obligation is to follow this Court's pronouncements. *Owsley v. Peyton,* 352 F.2d 804 (4th Cir. 1965). It is indeed to the trial judge's credit that he accurately perceived the direction in which the law on this subject was headed, and adhered to the precedent of his sister State to the east (*Rains v. Diamond M. Drilling Co.,* 396 So.2d 306 (La. App. 1981)), in following the *Liepelt dicta,* which ultimately became the law of this Court as well as of the Fifth Circuit. *Jones & Laughlin Steel Corporation v. Pfeifer,* ..... U.S. ....., 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983); *Culver v. Slater Boat Co.,* 644 F.2d 460 (5th Cir. 1981), 688 F.2d 289 (*en banc* 5th Cir. 1982) (*Culver I*); *Culver v. Slater Boat Co.,* 722 F.2d 114 (*en banc* 5th Cir. 1983) (*Culver II*), cert. denied, sub nom. *Schmidt v. Byrd,* No. 83-1749, 52 Law Week 3907 (June 18, 1984).

In light of the events subsequent to the trial judge's ruling and the ruling of the Court of Appeals, to suggest that those courts' rulings constitute a "challenge by the Texas courts to the abiding purpose of the Federal Employers Liability Act to 'create uniformity throughout the nation'." (Petitioner's Application, p. 14) is nothing short of ludicrous.

Indeed, if any challenging is going on in this area, we would respectfully suggest that it is happening within the Fifth Circuit, as was silhouetted by Judge Brown's brilliant dissent in *Culver II*:

> "With the ink scarcely dry on Pfeifer (Jones & Laughlin Steel Corp. v. Pfeifer, ... U.S. ....., 103 S. Ct. 2541, 76 L. Ed. 2d 768, 788 (1983)), in which, with re-

> markable unanimous clarity, the High Court chose not to pick one of the several methods in its collective economic hat it considered legally sound for calculating lost future wages in civil damage actions and instead chose to leave that crucial decision to the trial judge in that and future cases, a majority of this Court elevates one approach beyond any choice to be the only way, for mandatory application in eighteen federal judicial districts across a half-dozen Southern states, for a broad group of litigants to arrive at fair sums of money to compensate injured parties. Guided by the decision in *Pfeifer,* its approval of *Culver I,* and the direction that the choice of methodology should be left to the district court, not this Court. I respectfully dissent." (722 F.2d 123).

Though not called upon to do so we disagree vehemently with the Petitioner's allegations that Dr. Funderburk used the wrong discount rate. He arrived at his discount rate in the same fashion as his inflation rate, by averaging the statistical and market rates over a period from 1967 through 1980. Interest rates *and* inflation rates were both higher at the time of trial, but Dr. Funderburk testified that the fairest means of projecting each over the long haul would be obtained by averaging. We submit that this approach is both economically sound and fundamentally fair, because it strikes a balance between the extreme high and low interest rates at which the injured plaintiff may be forced to invest his award when it is received and in accordance with his choice of investment strategy.

The most appropriate, accurate, and fair method of determining a proper "market interest rate" for discounting purposes is a subject which the adversary system

can easily handle. The railroad chose not to put on countervailing expert testimony. As was pointed out in Note 1 above, it could very easily have done this without jeopardizing its position that *Penrod* was still the law.

It had the opportunity, and fully exercised it, to explore its views as to the method of computing the discount rate by cross-examination of Dr. Funderburk. Dr. Funderburk responded by pointing out the fallacies in the railroad's approach. The subject was thus a proper one for the trier of fact. Deciding between competing theories is the proper role of the jury. The fact that it chose one expert view over another is hardly ground for reversal. Yet, that is most certainly what - and all - the railroad argues on this point.

Finally, we would briefly address the merits of Petitioner's contention that this writ should be granted so that this Court could reverse the lower courts and remand for retrial under directions that the hard and fast methodology of *Culver II* be used. Even the *Culver II* majority perceived the innate unfairness of saddling its methodology on courts and litigants who tried their cases before its publication. Accordingly, it specifically held that the new method for handling inflation there adopted would *not apply* to cases tried before publication of the opinion. Yet this is precisely what Petitioner would have this Court do. Shouldn't the Texas Court of Appeals, who relied on *Culver I* in making its ruling on the narrow issue of admissibility of the evidence, be accorded the same respect as the *Culver II* majority extended to the lower Federal courts? Why of course!

CONCLUSION

This Court, by this Petition, is urged to take a one issue F.E.L.A. jury trial from the Texas State Court system, and grant the Petitioner a new trial so that it can offer evidence it consciously elected to forego at the trial almost three years ago. There is no conflict with the rulings below by any pronouncement from this Court, or from the Court of Appeals for the Fifth Circuit. Practitioners cannot keep their heads above the sand and not know the horrendous workload of this tribunal. The filing of this Petition grossly aggravates that problem. We respectfully pray that the writ be denied.

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By: FRANKLIN JONES, JR.
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that forty (40) printed copies of the foregoing Brief in Response to Petitioner's Petition for Writ of Certiorari were placed in the United States Mail, addressed to the Clerk of the Supreme Court of the United States, and three copies of the Brief were furnished to each of the following:

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This the 7th day of August, 1984.

FRANKLIN JONES, JR.
Attorney for Respondent

No. 84-58

IN THE

Supreme Court of the United States

October Term, 1984

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

BENNY K. CHAFFIN,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Supreme Judicial District of the State of Texas, at Texarkana, Texas

PETITIONER'S REPLY BRIEF

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August, 1984

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IN THE

Supreme Court of the United States

October Term, 1984

THE KANSAS CITY SOUTHERN
RAILWAY COMPANY,

Petitioner,

v.

BENNY K. CHAFFIN,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Supreme Judicial District of the State of Texas, at Texarkana, Texas

---

PETITIONER'S REPLY BRIEF

Respondent opposes certiorari on the mistaken assumption that the petitioner railroad has raised and preserved for review only the now-mooted question whether inflation can ever be factored into the computation of FELA damage awards. All the Questions Presented in the petition are said to have been waived or not preserved for review. Therefore, respondent claims, this Court "would have nothing to review" if certiorari were granted. Opp Br. 8.

Respondent's error lies in his refusal to recognize that the controlling federal rule respecting inflation testimony was drastically altered during the course of this proceeding. At the trial level, no evidence as to inflation was admissible (the *Penrod* rule). At the intermediate appellate level, the *Penrod* rule was abandoned and the *Culver I* in-

flation methodology was substituted. At the final appellate level, the *Culver I* methodology was abandoned in favor of a new *Culver II* methodology. Despite repeated efforts by petitioner to call the attention of the Texas appellate courts to these changing federal methodologies and to the intention of the Fifth Circuit that the new rules be applied retroactively to cases like the instant one, the Texas courts remained mute.

Significantly, respondent does not claim – and cannot claim – that the petitioner failed to raise or preserve the *Culver I* and the *Culver II* propositions at the appropriate points in these proceedings. Nor does the respondent assert that either the Texas Court of Appeals or the Texas Supreme Court ruled that the petitioner had waived or failed to preserve those federal propositions; indeed, the respondent made no waiver claims whatever in the courts below. Thus it cannot be said that the judicial action below rests on any adequate or independent state procedural ground.

In the circumstances of this federal cause of action, the refusal of the Texas appellate courts to address or resolve the *Culver I* and *Culver II* questions raised by the petitioner has "the necessary effect" of denying those properly raised claims. *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928). Compare *Lear, Inc. v. Adkins,* 395 U.S. 653, 662 n. 10 (1969), stating that this Court "clearly" has jurisdiction to review a state court's determination of a decisive issue of federal law as well as a "duty" to consider and vindicate a petitioner's federal claim on grounds somewhat different than advanced below where "matters of basic principles are at stake." The Questions Presented in this case are not significantly different from those presented to the appellate courts below; and there are certainly matters of basic principles at stake with respect

to the uniform administration of the FELA among federal and state courts.

To be more specific about some of the respondent's contentions, the petitioner calls the Court's attention to the following sequence of events:

(1) **The Penrod objection at trial.** Although he does not now acknowledge it, the respondent at the trial in November 1981 stipulated that petitioner "may have a continuing objection to any evidence adduced on inflation." S.F. 284; compare Opp. Br. 3. Petitioner had to make the objection by force of the then prevailing *Penrod* rule, announced by the Fifth Circuit in 1975, which dictated that juries not be permitted to consider "future inflationary or deflationary trends in computing future lost earnings." 510 F.2d at 241.

(2) **Penrod's applicability to this trial.** Contrary to the respondent's suggestion (Opp. Br. 4), the trial court's action in admitting inflation testimony was not justified by certain favorable dicta in this Court's opinion in *Norfolk & Western R. Co. v. Liepelt,* 444 U.S. 490, 494 (1980), or by what respondent states "was emerging at the time as the majority rule amongst the circuits." The fact is that the *Penrod* rule was in effect in all courts within the circuit at the time of this trial in 1981. Just months before the trial, the Fifth Circuit on two occasions announced that "Liepelt's favorable dicta is only that" and that until "the Supreme Court speaks more directly or we, as an en banc court, decide otherwise, *Penrod* still applies . . ." *Byrd v. Reederei,* 638 F.2d 1300, 1308 (5th Cir. 1981); *Culver v. Slater Boat Co.,* 644 F.2d 460, 463 (5th Cir. 1981).

(3) **Respondent's "Catch-22" contention.** Respondent argues that petitioner waived its objections to the inflation

evidence that respondent introduced at trial, inasmuch as petitioner "elected not to rebut this testimony, or object to the methods used by Respondent's expert in reaching his conclusions." Opp. Br. 4-5. This is a classic "Catch-22" argument. The most elementary procedural rules teach that had petitioner sought to contradict such testimony, its *Penrod* objection would have been waived[1] and its right to appeal on the basis of the then prevailing federal law would have been forfeited. On the other hand, if petitioner had maintained its *Penrod* position at trial, as it did, respondent would force petitioner to waive its right to take advantage of the post-trial overruling of *Penrod* and of the retroactive application of the *Culver I* and *Culver II* methodologies.

Such an argument serves to highlight the procedural unfairness that results when state appellate courts, in a federal case in which damages are the only issue, decline to follow changes in the controlling federal law of damages that occur while an appeal is still *sub judice*. And in light of the Fifth Circuit's repeated insistence that the *Penrod* rule be followed at the time of this trial, respondent's remark that "almost any fool could have seen [that] the

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[1]Respondent misreads the Texas evidentiary rule on waiver. The leading text on the Texas rule, relied upon by both petitioner and respondent, states: "Where a party has objected to evidence of a particular fact and later produces evidence from his own witnesses of the same fact he will be deemed to have waived his objection." 1 R. Ray, *Texas Law of Evidence*, Sec. 27, at 36 (3d ed. 1980). Thus had the petitioner countered Dr. Funderburk's testimony as to inflation with its own expert economic witness, petitioner would have waived the continuing objection to the introduction of all evidence as to inflation.

But the same Texas authority states that mere "cross-examination of his adversary's witness [i.e., Dr. Funderburk] about the same matter will not be treated as waiver." *Id.*, at 37. Thus petitioner's cross-examination of Dr. Funderburk did not constitute a waiver of the continuing *Penrod* objection.

carcass of *Penrod* was headed for . . . [the] grave" (Opp. Br. 5) does nothing to advance respondent's argument that petitioner should have foreseen the overruling of *Penrod* and taken proper steps to build its case and its claims around one of the unborn methodologies.

(4) **The Penrod rule on the appeal.** Respondent ignores the fact that the *Penrod* rule remained in effect for some time after the trial and during the initial phases of the appeal period. That explains why the petitioner pursued its *Penrod* objection in its briefs and oral argument before the Texas Court of Appeals.[2] See Opp. Br. 3-4. The overruling of *Penrod* did not occur until *after* this case had been briefed and argued on the appeal. And when *Culver I* announced that *Penrod* was overruled, the parties promptly brought *Culver I* to the attention of the Texas Court of Appeals. That court affirmed the trial court's violation of *Penrod* by reference to that portion of *Culver I* that overruled *Penrod;* but the remaining portions of *Culver I* that established a new rule of admissibility of inflation evidence were ignored by the Texas Court of Appeals.

(5) **The Culver I phase of the appeal.** The new *Culver I* methodology, announced on September 22, 1982, remained the controlling federal rule throughout the remainder of the pendency of the appeal of this case to the Texas Court of Appeals. Also, during that pendency, this Court's decision in *Jones & Laughlin Steel Corp. v. Pfeifer,* 103 S.Ct. 2541 (June 15, 1983), was announced and was brought to the attention of the Texas court. But the Texas court made no effort in its decision of July 19,

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[2]Had *Penrod* not been overruled during the course of the appeal of this case, the Texas Court of Appeals doubtless would have reversed the trial court's action in admitting Dr. Funderburk's inflation testimony and in allowing the jury to consider such testimony. Such action was contrary to the *Penrod* command.

1983, or in the course of denying rehearing on August 16, 1983, to apply the *Culver I* or the *Pfeifer* principles to the facts of this case or to order a new trial in accordance with those principles. That inaction by the Texas Court of Appeals creates some of the issues that petitioner now puts to this Court, issues that could not have been anticipated or raised at the trial court level but that were raised in the petition for rehearing in the Texas Court of Appeals. See *Brinkerhoff-Faris Trust Co. v. Hill,* 281 U.S. 673, 677-678 (1930).

(6) **The Culver II phase of the appeal.** On December 22, 1983, while petitioner was seeking to invoke the review jurisdiction of the Texas Supreme Court, the Fifth Circuit decided *Culver II.* The *en banc* Fifth Circuit there repudiated the use of the *Culver I* "case-by-case" methodology in jury trials within the circuit, and mandated the use of the "below-market discount" method. *Culver II* also directed that the new methodology be applied retroactively to all cases still on appeal in which the principles of *Culver I* had not been presented to the jury by instructions or employed by the trial judge in findings of fact fixing damages. 722 F.2d at 123. The instant case fits that description.

Petitioner accordingly raised both *Culver I* and *Culver II* issues in its application to the Texas Supreme Court for a writ of error. And when the court denied the application with the notation "no reversible error," petitioner renewed those contentions in a petition for rehearing.

Basically, the questions presented to this Court were generated during the course of the appellate rather than the trial proceedings in this case, compounded by the

parallel circumstance of dramatic changes in the controlling federal rule of damage calculation. How should the state courts react to those changes in federal law? Does the principle of uniformity in the administration of the FELA demand that state court judgments on appeal be modified to conform to new methodologies for assessing the impact of future inflation on the computation of lost lifetime earning power? Should the single methodology selected for jury trials by *Culver II* be applied retroactively? The Fifth Circuit has already answered that question affirmatively in a case tried in federal court. See *Martin v. Missouri Pacific R.Co.*, 732 F.2d 435 (5th Cir. 1984). How can there be a contrary rule for an FELA case tried in a state court? All of these questions have been properly raised and preserved by petitioner, questions that are the product of the conflicting federal and state appellate determinations.

CONCLUSION

For these reasons, responsive to the arguments raised in opposition, certiorari should be granted. As three commentators have recently noted, *Pfeifer* and *Culver II* "have placed plaintiffs and defendants on a more equitable footing and have moved the trial of damages away from a 'graduate seminar on economic forecasting' toward a more workable standard – a method that should serve the goals of judicial efficiency and predictability of awards." George, Simien and Culbertson, *The Courts and Inflation*

— *Two Case Studies: Pfeifer and Culver II,* 20 Trial 22 at 26 (No. 7, July 1984). This case is an appropriate vehicle for assuring that the *Pfeifer* and *Culver II* goals apply equally to FELA jury trials occurring in state courts.

Respectfully submitted,

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